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**DISPARITIES IN THE JUDGE'S DECISION ON NARCOTIC
CRIME**

Kurnia Dewi Anggraeny (a)*

*Corresponding author

(a) Faculty of Law, Universitas Ahmad Dahlan, Yogyakarta, Indonesia, kurniadewi@law.uad.ac.id

Abstract

The paper analysis the disparities in the judge's decision on narcotic crime, especially in the District Court of Yogyakarta. In practice, the judges consider some factors that may influence their decision. These factors may be different from one crime to another. There are some factors causing the disparities in the verdicts of narcotic crimes. Those are the judges' character, the regulations, and the characteristics of the case. The efforts to reduce the disparities can be conducted by actualizing the functions of the panel of judges, maximizing the judges' potentials. Besides, trainings and seminars for all criminal justice sub-system can also develop similar perspective of the vision and mission of the court. Further, it is necessary to provide clear guidelines to measure the sanction of the crime by considering the motives of the suspects. Another possible effort is to improve the role of the appeal court, to select and train the judges, particularly for the consistency of the sentences in the District Court. The methods allow the judges to consider all events based on the severity of the crime and the way the crime was committed. With regard to the case of narcotic abuse, it is necessary to provide clear guidelines of decision to impose the sanctions which is in line with the evidences and the motives of the suspects of narcotic abuse.

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1. Introduction

The history of Indonesian criminal law began from the customary penal law to the penal code as a normative law. Not only did it change in terms of space and location, but also in terms of time.

The criminal law in Indonesia reforms continuously through several attempts such as (Arief, 2009):

1. Legislation with the aim of amending, supplementing and supplementing the existing Penal Code; and
2. Arrange the Draft of the Criminal Code (R-KUHP) which aims to replace the current Penal Code and is a colonial legacy.

The attempts to reform the penal law are subject to political, sociological, practical reason, as well as adaptive reason that Indonesian Penal Code once in the future would be able to adapt any International inclinations recognized by civilized society.

As a common knowledge, the purpose of criminal law is basically to give deterrence effect and equal punishment adjusted to the crime committed without perceiving the psychological condition of the suspect. Then, it develops to the term of criminology, scientific study of the nature, factors causing criminal behavior, and the law enforcement against those criminal behaviors (Abidin, 1995). Criminology is the study of the fundamental causes of criminal behavior.

Etymologically, criminology derives from the word “*crime*” and “*logos*” which means knowledge or science. Therefore, criminology broadly and completely means the scientific study of criminal behavior (Dr. Rahman Amin, 2015).

Criminology develops rapidly due to its logical consequences of the development of the type of crime in society. The development of crime is not uncommon, as it has been familiar for human since the very first human creation on earth. Moreover, improvement of knowledge and innovation of technology give bigger chances to the development of any kinds or types of crime. Criminology, in its actualization, then tries to seek for solution to anticipate those modernistic crimes as well as their indication.

One of the benefits from criminology is the capability to reveal the motives of either an act of misdemeanor or felony, including the abuse of narcotics. Under criminology study, narcotics trafficking, and other similar kinds of drugs, gambling and prostitution are classified into “victimless crime.” The naming refers to its criminal nature where there are two parties entering into illegal transaction even so both do not suffer damage one another.

2. Problem Statement

Indonesian society shall be more aware and cooperate in supervising tightly against the abuse of narcotics in each region, as this crime has been rampant in every region, including in Yogyakarta.

Numbers of narcotics cases in Yogyakarta have bothered its commonly slogan “Yogyakarta Berhati Nyaman” (Yogyakarta is comfortable). The news published in *detik.com* mention that the new type of narcotic, namely Gorilla Tobacco, has spread up (Negara, 2012). Directorate of Drug Investigations in District Police Department of Special Region of Yogyakarta, Andi Fairan, stated that this new type of narcotic is physically similar to cannabis (Negara, 2012). This narcotic is found in a

house as a result of the raids in Imogiri, Bantul. Nonetheless, this new type of narcotic has not yet been listed in the Drugs Act in Indonesia, whereas its effect is akin to the cannabis use, simulated flying ability.

Business on narcotics does not only attract common people but also people who have often handled narcotics crime due to its expensive nature. Even though many people have understood deeply the regulation and prohibition of narcotics abuse, narcotics attract people treacherously. It is proven by the case revelation of warden in Penitentiary in Wirogunan Yogyakarta who was caught by the officer of Directorate of Drug Investigations in District Police Department of Special Region of Yogyakarta (Sipir Lapas Wirogunan Pasok Ganja ke Napi, 2015). He was arrested for being carrier of cannabis in the Penitentiary and be paid of only Rp 100.000.

The research of National Body of Narcotics showed that narcotics abuse in the Special Region of Yogyakarta in 2008 reached to 1.99% or around 3.3 million people. While in 2010, it increased to 3.8 million people (2.21%), and in 2015 reached the number of 5.1 million people (2.8%). The more drug users increase, the more they fascinate drug syndicate operation; the greater the market, the greater the price would be.

Government and society shall utterly cooperate in tackling the threat of narcotics considering the above-mentioned facts. However, the reality of law enforcement against narcotics crime in Indonesia leads to big question. The trends in the law enforcement happen to the throw back on others' responsibility and the inconsistency of the law enforcement in fighting against narcotics crime.

Sentencing disparity has essential impact because it comprises constitutional consideration between individual freedom and state rights to impose criminal punishment. Criminal punishment shall means the imposition of intentional suffering by person or institution who have the power and authority over an individual who, according to the law, has committed crime.

Related to correction administration, disparity would cause fatalistic consequences. Criminal who compares his conviction to other criminal and believe that there has been sentencing disparity would consider himself as the victim of judicial caprice (Arief, 2005). He would have been difficult to rehabilitate and would not respect the law, whereas respect should be a purpose of penalization. This problematic issue would be an indicator and manifestation of failure of system, which is supposed to reach equal justice in within state, and also would lessen society's trust towards criminal law enforcement.

3. Research Questions

From above explanation in background and problem statement, this study questions two matters, specifically:

1. Why does the sentencing disparity of judge decision towards narcotics crime occur?
2. What are the considerations of judge in his/her decision towards narcotics crime?

4. Purpose of the Study

This paper aims to answer two above questions, specifically:

1. To understand the reason of the occurrence of sentencing disparity towards narcotics crime

2. To know the matters which become the judge consideration in his/her decision towards narcotics crime.

5. Research Methods

The data were collected in the juridical-normative approach through:

1. Library research/literature, which is an assessment of written information about the law from any widely disclosed sources. This method assesses scientific articles, literature, judge decision related to narcotics case.
2. Document research, which is an assessment of written information about the law from undisclosed sources, except for certain party such as lectures, researcher, and practitioners for the purpose of legal research, development of law, legal practice. Those sources consist of any institutional official documents in the form of judge decision, the Act Number 35 Year 2009 concerning Narcotics, some other regulation, report of legal research, interview with judge, and other document related to the research problem.

6. Findings

Narcotics crime is classified as extraordinary crime and the authority possibly institute specific penal proceedings based on the Act Number 35 Year 2009 regarding Narcotics. Since its enactment, the impositions of punishment are various and severe. The sanctions consist of fine, lifetime imprisonment, and even death penalty.

Some people often argue that criminal action committed by someone is not comparable to others' as similar felony. The disparity of criminal sanction towards people who commit similar crime is not rarely occurs. For example, in narcotics case, imposition of criminal sanction towards one user to another user might be different. Sentencing disparity ensues inequality of sanction among narcotics abuser. Although in putting the base on identical basis of article, the distinction of evidence is not noticeable. It also occurs that among the cases with significantly different evidence, the imposition of sanction is identical.

Article 1 paragraph (1) of the Act Number 48 Year 2009 regarding Judicial Power, states that, "Judicial Power is the power of an independent state to establish justice in order to uphold the law and justice based on Pancasila and 1945 Republic of Indonesian Constitution, for the manifestation of the Rule of Law of Republic of Indonesia. Therefore, judicial power is identical with the power to enforce the law or the power of law enforcement (Arief, 2003).

Penalization is the heart of every criminal system, which is supposed to actualize law enforcement. Thus, it takes central role. Judge's decision in imposing criminal sanction would result into wide consequence, related either to the criminals, victims, or society in general. Worst is when the decision is considered controversial. The truth is basically relative and depends on how people observe. Indicator to measure the value of justice in certain judge decision is using disparity of sentencing.

6.1. Sentencing disparity among Judge Penal Decision concerning Narcotics Case.

1) Case Position

This research analyzes three judge decisions in 2016 concerning the violation of article 127 section (1) of the Act Number 35 Year 2009. The highest penal sanction is 1 year and 4 months imprisonment, while the lowest is 5 months imprisonment and given the chance to rehabilitation.

a) Judge Decision Number 105 / Pid.Sus / 2016 / PN Yyk (The Crime of the Abuse of Narcotics Schedule I, 2016)

Tuesday the 9th of February 2016 at around 21.00 WIB, in Candi Gebang Jetis Rt. 006 Rw. 004, Wedomartani, Ngemplak, Sleman, the defendant ANDHI BAYU PAMUNGKAS had abused Narcotics Schedule I in type of shabu (methamphetamine) for himself. The defendant obtained shabu by ordering through SMS (Short Message Service) to Helmi (fugitive) and he should transfer money in amount of Rp 800.000, - (eight hundred thousand rupiah).

The defendant had often used shabu and when he used it for at least 5 suction in his dorm by himself, the officer of the Yogyakarta Police Resort Department arrested him. After searching, the officer found 2 (two) clip plastics contained shabu (more or less) 0, 10 gram, 1 (one) green bong made from the Big Cola bottle and perforated bottle cap for 2 white pipettes, 1 (one) glass pipette, 1 (one) blue matches and 1 (one) cotton bud kept in the refrigerator.

The defendant use Narcotic Schedule I in the type of shabu for himself and has no permit from the Ministry of Health of the Republic of Indonesia or other authority. Based on urine test, the defendant positively carrying methamphetamine in his body (+).

For his actions, the defendant ANDHI BAYU PAMUNGKAS has been proven legally and convincingly guilty of committing a criminal act of misuse of Narcotics Group I (one) not a crop for himself and sentenced to carry out rehabilitation for 5 (five) months at the Pamardi Putra Social Rehabilitation Center (BRSPP) Kalasan Daerah Istimewa Yogyakarta.

b) Judge Decision Number 110 / Pid.Sus / 2016 / PN Yyk (The Crime of the Abuse of Narcotics Schedule I, 2016)

Friday the 12th of February 2016 at around 04.00 WIB, the defendant MUHAMMAD FARIZMAN a.k.a. ARIS Bin SYAHRUDDIN joined his friends in the dorms located in Jl. Kyai Mojo Sidomulyo RT 4 No. 278 Bener Tegalrejo, Yogyakarta. The defendant and his friend consumed shabu which had been bought before from Boim (fugitive) in amount of Rp 580.000, - (five hundred and eighty thousand rupiah) for 0, 5 (zero point five) gram shabu. The defendant had no permit from the Ministry of Health of the Republic of Indonesia or other authority.

Based on Police Investigation Report, urine of the defendant MUHAMMAD FARIZMAN a.k.a. ARIS positively contain Methamphetamine (+).

For the above acts, the defendant MUHAMMAD FARISMAN a.k.a. ARIS Bin SYAHRUDDIN mentioned above has been proven legally and convincingly guilty of committing the crime of abuse of Narcotics Group I is not a crop for himself and in imprisonment for 1 (one) year.

c) Judge Decision Number 114 / Pid.Sus / 2016 / PN Yyk (The Crime of the Abuse of Narcotics Schedule I, 2016)

Sunday the 7th of January 2016 at around 12.00 WIB in the dorm located in Timuran Rt 009 Rw 003, Brontokusuman, Megangsan, Yogyakarta, the defendant MUHAMMAD JODI ERMANTO a.k.a AMBON Bin BERLIANTO used 1 (one) roll of cannabis by burning it with matches and inhaled its smoked just like smoking cigarette.

Then on Monday the 8th of February 2016 at around 12.00 WIB, the defendant smoked 1 (one) more rolled cannabis in the same way as before. His conduct was recognized by police offices from the Directorate of Investigation of Drugs in the Police Department of D.I. Yogyakarta and the defendant MUHAMAD JODI ERMANTO a.k.a. AMBON Bin BERLIANTO had no permit from the authority to use the cannabis.

The urine test of MUHAMAD JODI ERMANTI a.k.a. AMBON Bin BERLINATO positively shows his urine contain Cannabinoids (+).

For his actions, the defendant MUHAMAD JODI ERMANTO has been proven legally and convincingly guilty of committing a criminal act of misuse of Narcotics Group I For Self in the form of plants for themselves and undergoing rehabilitation at BRSP Healthy Mandiri Yogyakarta for 1 (one) year and 4 (four) month.

1) The description of Sentencing Disparity among Judges' Penal Decision concerning Narcotics in the District Court of Yogyakarta

The main idea of sentencing disparity according to Supreme Court Judge, Dr. Salman Luthan, S.H., M.H. is unequal penalization towards same offences (Dr. Salman Luthan, 2016).

Similar statement is also proposed by Bambang Poernomo by saying that problematic sentencing disparity is the unequal penalization towards the same offences and same condition, while unproblematic disparity is in case the judge decisions are different among similar offence with different situations and conditions (Poernomo, 1992). He also contends that judge consideration would always develop along with the development of era (Poernomo, 1992).

Analyzing three penal decisions of narcotics crime in the District Court of Yogyakarta, problematic disparity of sentencing seems to occur because all those penalization were imposed in different condition and situation. It is proven by the gap of punishment between 1 year and 4 months imprisonment and 5 months imprisonment along with the chance for rehabilitation, whereas imposition of both punishment were based on the violation of narcotics abuse prohibition, specifically article 127 section (1) of the Act Number 35 Year 2009. From all those three decisions, only one decision gives chance for rehabilitation to the defendant whereas those cases concern to the same offence that is narcotics abuse which granted under the article 127 section (1) of the Act Number 35 Year 2009.

The gap of sentencing between the lowest sanction, which is 3 months and the highest is 1, 6 years, is 15 months (1, 3 year). This number is slightly insignificant number. However, considering all those decision imposed in the same situation and condition, thus, according to Bambang Poernomo, problematic disparity of sentencing had occurred (Poernomo, 1992). The number of 15 months disparity then becomes significant gap.

Based on several experts' opinion, it concludes that disparity of sentencing concerning narcotics crime in the District Court of Yogyakarta had occurred, and generally this disparity is problematic because it happens to the decisions over the same condition and situation case. Similarly, in the same

period in 2016, these condition and situation show high level of the abuse of narcotics. Other than that, sentencing disparity in the District Court of Yogyakarta is problematic as it has injured the sense of justice in society for instance in its minimum penalization towards the actor of narcotics abuser.

2) Judge Consideration in His/her Decision

Indonesia is one of the States which now incessantly fight drugs due to apprehensive abuse. The question is why the decisions imposed in relatively similar period and have the same nature of conditions and situations give different sentencing towards the actors.

In this case, we cannot blame the judges as they have taken into account a careful consideration in all aspects during the fact-finding process. Besides, they also observed the behavior of the defendant.

According to Erna Indrawati (2013), disparity of sentencing might occur due to every case undergo different situation as well as various defendant's behavior. Therefore, these differences may cause disparity of sentencing among defendants. The disparity of those three decisions in this research could be considered reasonable.

One of the elements of crime is subjective, which lies within the defendant's state of mind or any other related matters in his mind. The subjective element of crime among others is intentional (*dolus*) and careless/unintentional (*culpa*). By this alteration, the punishment to someone who intentionally commits crime shall be different from someone who carelessly/unintentionally commits crime.

Another consideration in sentencing is the amount of narcotics owned by the actor. Even though the amount of narcotics is not listed in the incriminatory consideration, those three decisions show that the more narcotics owned by the actor, the higher penal decision would be imposed to him.

Judges are human. Thus, in their decision to seek the truth, it does not mean his believe would be the absolute truth. From the explanation above, the judge will concern more on the amount of evidence owned by the actor rather than the motive of narcotics abuser. This does not necessarily cause injustice, but injustice will occur when comparing one decision to another.

Disparity of sentencing also occurred due to Indonesian positive laws has not yet provide clear and exact guidelines of sentencing. The independency of judge shall not be excessive, which possibly cause conspicuous unequal sentencing. Therefore, a guideline of sentencing under Indonesian Criminal Code is deemed necessary in order to decrease unequal sentencing though would not eliminate it at all.

Besides, the Act Number 35 Year 2009 does not distinguish the subjective elements of intentional (*dolus*) or careless (*culpa*). This makes the defendant's state of mind in committing crime is excluded from the judge consideration in sentencing him/her, thus somehow the defendant is bothered as he/her does not obtain justice.

7. Conclusion

The analysis in previous chapter results to conclusions as follows:

- a. Disparity of sentencing in judge decision towards the narcotics abusers in the District Court of Yogyakarta did occurred. Practically, judges are sentencing in order to give correction towards the actors by considering some factors. These factors influence the judge penal decision. The sentencing might differ from one actor to the other actor. These disparities happen in three decisions of narcotics case in the District Court of Yogyakarta which become object of this

research. Those decisions concern to similar violation of article 127 section (1) of the Act Number 35 Year 2009.

b. Disparity of sentencing occurs due to several factors as follow:

First, the sentencing disparity begins from within the law. Indonesian Criminal Code does not contain the guidelines of sentencing (*strafvoetingsleiddraad*) from the lawmaker, which concerns to the perceptible principles to be taken into account in sentencing. It contains only the rules for punishment (*strafvoetingsregels*). Therefore, there is no such punishment standard (law substance), specifically in this research that refers to the Act Number 35 Year 2009 on Narcotics.

Second, under Indonesian positive penal law, the judges have wide independency to choose which type of crime shall be taken into account (*strafsoort*) in relation to the alternative system in indictment under the laws.

Third, judges will consider the degree of evidence found during the investigation, the search, or the arrest. Besides, judges will consider the way the evidence is obtained, whether during the period of the defendant being arrested or during the process of investigation.

Fourth, the motive/state of mind of the defendant in committing the crime would be listed as consideration of the judge, which then linked to the result of the crime.

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